Supreme Court, U.S.
FILED
SEP 14 1999
OFFICE OF THE CLERK

No. 98-1864

IN THE
Supreme Court of the United States

DEBORAH KATZ PUESCHEL,
Petitioner,

v.

RODNEY E. SLATER, SECRETARY,
U.S. DEPARTMENT OF TRANSPORTATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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1. The district court granted summary judgment for respondent on petitioner's claim under the Rehabilitation Act, on the ground petitioner was simultaneously arguing that she was disabled and that she wanted to work with accommodation. According to the district court, "she can't have it both ways. That's not right." Pet. App. 17a. The court of appeals affirmed. Petitioner has applied for a writ of certiorari for the purpose of vacating and re-

manding to the court of appeals in light of this Court's subsequent decision in *Cleveland v. Policy Management Systems Corp.*, 119 S.Ct. 1597 (1999). That decision held that because "there are too many instances in which" claims of disability and requests for accommodation "can comfortably exist side by side", there should not have been a negative presumption such as that applied in this case by the district court. *Id.* at 1602.

2. Respondent concedes that this "aspect of the district court's reasoning is inconsistent with this Court's opinion in *Cleveland*". Opp. at 5-6 n.2. However, respondent argues that this reasoning was not critical to the district court's decision and that the court of appeals did not specifically endorse it. *Id.*

3. Respondent's concession that the district court's reasoning has been overruled by intervening events is a fundamental basis for vacation and remand. *See Lawrence v. Chater*, 116 S.Ct. 604, 607-607 (1999).

4. Upon remand, the court of appeals would have to give petitioner the opportunity to explain the apparent inconsistency between her claim of disability and her claim for accommodation. At that point, the court of appeals would also have to remand to the district court, to consider for the first time whether respondent owed petitioner a duty under the Rehabilitation Act to assign her to another vacant position, consistently with her doctor's indications that she was capable of performing other duties with no difficulty. Pet. App. 32a, 31a. The district court and court of appeals never addressed these questions on the mistaken belief, now overruled, that petitioner's assertions of disability precluded her from claiming protection as a "qualified individual with handicaps". Pet. App. 5a.

5. Respondent further argues that there is no basis for a remand, because petitioner's claim that she should have been accommodated under the Rehabilitation Act involves "only the application of settled law to the specific facts of [her] case." Opp. at 7. Respondent also argues that the issue raised by petitioner "is a fact-bound question that does not merit the Court's review". Opp. at 6. Without question, the application of *Cleveland* to the facts of this case is a matter for the lower courts in the first instance. The necessary review by the lower courts can only be obtained through vacation and remand.[1]

CONCLUSION

Petitioner requests that her petition for a writ of certiorari be granted.

Respectfully submitted,

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[1] Respondent also suggests that to the extent petitioner claims assignment to another position as part of her accommodation, she has failed to identify any such position and the issue was not addressed by the court of appeals. Opp. at 7-8 & n.5. It is beyond dispute, of course, that petitioner repeatedly requested accommodation under the Rehabilitation Act; petitioner cannot be denied review solely because of the lower courts' mistaken holding that she was not entitled to accommodation because of her disability. Pet. App. 5a. Moreover, as demonstrated by the applicable regulations, Petition at 2-3, the burden of proof with respect to other positions falls on respondent, the party with access to this information; the absence of evidence on an issue typically is held against the party which bears the burden of proof on that issue.